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Supreme Court of the United States

October Term, 1998

No. 98-1008

OLGA [illegible] DANIEL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No._____

OLGA RUTH DANIEL,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the Petition For Writ of Certiorari be denied, for the reasons herein given.

CITATION TO OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 118 Ga. App. 370, 163 S.E. 2d 863. The denial of the Motion For Re-hearing follows said decision, and noted at 118 Ga. App. 375, 163 S.E. 2d 863. The actions of the Supreme Court of Georgia on Respondent's petition for certiorari are unreported.

JURISDICTION

The jurisdiction of the court is conceded.

QUESTIONS PRESENTED

Respondents cannot agree with the articulation relied upon by petitioner in stating the questions presented, since the same disregards the facts in the case. Accordingly, Respondents have reworded the questions in light of the actual evidence introduced on the trial as follows:

1. When a search is made pursuant to a lawful search warrant, and instrumentalities by which the crime was committed seized, and the defendant arrested at the same time, pursuant to a valid arrest warrant, can that evidence be suppressed because not specified particularly in the warrant?

2. Does due process require that a defendant be permitted to view the entire statement given the State by its principal witness, when that statement relates to much more than the case on trial, and when the defendant has been furnished with that portion of the statement relating to the case on trial, as determined by the Court in an in camera inspection of the entire statement?

STATEMENT OF THE CASE

While Petitioner's statement of the case is essentially correct, said statement omits certain salient portions thereof which are essential to this Court's determination of whether or not to grant the Writ of Certiorari. Accordingly said portions will be included in Respondent's additions to the statement of the case.

THE SEARCH

Both Erby Joe Daniel, hereafter referred to as Erby, and his mother, the petitioner, were indicted for this

offense for which Petitioner stands convicted. Indictment No. 93555 related to Erby, and Indictment No. 93556 relates to the Petitioner.

Detective Norton first learned of Olga Daniel's dealings with the car in question from Russell Gugliotta (R-172; T-143), and immediately called upon Erby, ostinsibly the owner of the car, said conversation taking place on December 5, 1967 (R-190; T-161).

During this conversation Erby admitted that he was the owner of the car, and that he had purchased it from one Sol Greenberg, for $3,100.00 at the Riviera Motel a (motel in Atlanta, Fulton County, Georgia), that he had taken the car to Clearwater, Florida, but that the car's papers were in his safe deposit box in a bank in Atlanta. Erby was accompanied to the bank, but could not produce any of the car's papers (R-145-7; T-116-118). At this time Detective Norton had already been informed by Gugliotta that he was contacted by Salvatore, alias Little Sally and Robert Medine, alias Little Rabbit, on November 3, 1967, that they had brought the car in question from New York to deliver to Petitioner. Gugliotta accompanied them to Petitioner's apartment. (R-228; T-199), where she bought the car for $1,500.00, paying $500.00 cash and receiving $500.00 credit for each of two stolen Cadillacs which she helped dispose of. (R-229; T-200). Gugliotta witnessed the transaction to be sure that "Sally" and "Little Rabbit" were paid by Petitioner (R-231; T-202).

After Detective Norton's conversation with Erby, the car was located in Clearwater, Florida by the F.B.I. Detective Norton went to Clearwater, checked the car and made an imprint of the correct V.I.N. number which

he compared with the fraudulent V.I.N. plate attached to the doorpost. (R-148-52; T-119-123).

Detective Norton returned to Atlanta, and obtained an arrest warrant for Petitioner and Erby, and a search warrant for Petitioner's apartment, said warrants being obtained on December 9, 1967, (R-163; T-134), and executed on December 19, 1967 (R-188; T-159). Accompanying him on the raid was Mr. Roger Thompson, the Assistant Solicitor General who prosecuted the case.

During the course of the search, not after its completion, the arrest warrants against Petitioner and Erby were executed (R-156, 169, 188; T-127, 140, 159).

During the course of the search State's exhibits 11, 12, 13, and 14 were seized. Of these the two receipts were in open view—Petitioner had removed them from her pocketbook and attempted to hide them under her dress; but they were taken from her hand (R-167; T-138).

THE STATEMENT

Instrumental in the conviction of Petitioner was the testimony of Russell Gugliotta, an accomplice of Petitioner who had previously been convicted in the Superior Court of Fulton County, Georgia, for the offense of possession of an automobile with an altered serial plate, and who received a sentence of five years imprisonment therefor. After his conviction, Gugliotta gave the police a lengthy statement relating to the Mafia's activities, a portion of which related to the Petitioner and the case on trial. (R-220; T-191; R-226-8; T-197-9; R-246; T-217).

During the course of the trial, Petitioner made numer-

ous requests to be allowed to view the entire Gugliotta statement, which requests the Court denied until after the State had rested, at which time the Court directed the Prosecutor to furnish the Petitioner with that portion of the statement relating to her and the case on trial. The Prosecutor anticipated the Court's ruling and had previously prepared such portion which he submitted to the Court, along with the entire statement, for an in camera inspection thereof for the purpose of determining whether or not the Prosecutor had complied with the Court's order. The Court held such an examination and determined that the Prosecutor had complied with the Court's request. (R-258-263; T-229-234).

REASONS FOR NOT GRANTING THE WRIT

1. WHEN A SEARCH IS MADE PURSUANT TO A LAWFUL SEARCH WARRANT, AND INSTRUMENTALITIES BY WHICH THE CRIME WAS COMMITTED SEIZED, AND PETITIONER ARRESTED CONTEMPORANEOUSLY THEREWITH, PURSUANT TO A VALID ARREST WARRANT OBTAINED AT THE SAME TIME AS THE SEARCH WARRANT, SUCH EVIDENCE IS NOT ENTITLED TO BE SUPPRESSED BECAUSE THE ITEMS SEIZED WERE NOT SPECIFIED IN THE SEARCH WARRANT.

Petitioner complains of the introduction into evidence of three items seized during the course of the search of her apartment. The basis of the complaint is, not that the police officer had insufficient probable cause to obtain the search warrant, but that the officer had little expectation of locating the items named in the search warrant in a search of Petitioner's apartment at

the time the search took place – that the issuance of the search warrant was merely an excuse for a general search.

Conceding that a general search is unlawful, Petitioner ignores the fact that at the same time the search warrant for her apartment was obtained, arrest warrants for herself and her son were also obtained, which warrants were executed during the course of the search. While it is generally true that papers not described in a search warrant may not be seized, an exception to said rule exists, where the papers seized are instrumentalities of the crime itself. *Woo Lai Chun v. United States,* 274 F. 2d 708 (9th Cir., 1960), *Marron v. United States,* 275 U. S. 192, 196; 48 S. Ct. 74; 72 L. Ed. 231, 237 (1927); *Takahashi v. United States,* 255 U. S. 298, 41 S. Ct. 261, 264; 65 L. Ed. 647, 651 (1921); *United States v. Lefkowitz,* 285 U. S. 452, 52 S. Ct. 420, 76 L. Ed. 877, 82 ALR 775 (1932); *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931); *Gouled v. United States,* 255 U. S. 298 (7) (1920). Respondent submits that the articles complained of constituted instrumentalities of the crime itself, for they enabled Petitioner to obtain a valid title to the stolen car in question. However, even if the items seized constituted mere evidence of the crime, they are still subject to seizure. *Warden v. Hayden,* 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1968).

Notwithstanding the search warrant however, the items were still entitled to seizure because they were seized contemporaneously with the arrest of Petitioner and her son. *Marron v. United States, supra; United States v. Rabinowitz,* 339 U. S. 556; *Harris v. United States,* 334 U. S. 699; *Abel v. United States,* 362 U. S. 217 (1960).

2. DUE PROCESS DOES NOT REQUIRE THAT A DEFENDANT BE PERMITTED TO VIEW THE ENTIRE STATEMENT GIVEN THE STATE BY ITS PRINCIPAL WITNESS, WHEN THAT STATEMENT RELATES TO MUCH MORE THAN THE CASE ON TRIAL, AND WHEN THE DEFENDANT HAS BEEN FURNISHED WITH THAT PORTION OF THE STATEMENT RELATING TO THE CASE ON TRIAL, AS DETERMINED BY THE COURT IN AN IN CAMERA INSPECTION OF THE ENTIRE STATEMENT.

As previously mentioned the statement given by Gugliotta related to the activities of the Mafia, with only a small portion thereof relating to the case on trial. The Prosecutor anticipated the Court's ruling regarding the statement, and removed therefrom that portion of the statement relating to the case on trial, which portion was subsequently furnished the Petitioner for the purposes of cross-examining Gugliotta. Prior thereto, the Court was furnished with the entire statement for comparison with the portion to be furnished Petitioner, and the Court agreed that the portion to be furnished was all that the statement contained relating to the case on trial.

Petitioner concedes that she is asking the Court to clothe the ruling of the court in *Jencks v. United States,* 353 U. S. 657 (1956) with constitutional proportions. This Court has specifically refused to do so, the most recent occasion being January 14, 1969, *United States v. Augenblick,* No. 45, Oct. Term, 1968, 37 L.W. 4081, 84. See also *Palermo v. United States,* 360 U. S. 343. The Jencks rule is merely an evidentiary rule authorized by this Court's supervisory function of the lower fed-

eral courts, and should not be raised to the level of a constitutional requirement.

CONCLUSION

For all the foregoing reasons, Respondent urges this court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid, addressed to Albert M. Horn, Esquire, 725 Candler Building, Atlanta, Georgia 30303, counsel of record for Appellant.

This.....day of February, 1969.

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